IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TYSON A. L. QUISANO, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	CIVIL NO. 07-00594 JMS/BMK ORDER DENYING QUISANO'S PETITION FOR WRIT OF ERROR CORAM NOBIS

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I. INTRODUCTION

Currently before the court is Petitioner Tyson A. L. Quisano's ("Petitioner" or "Quisano") Petition for Writ of Error Coram Nobis to modify a $15,000 fine imposed in a March 14, 2006 judgment. Pursuant to Local Rule 7.2(d), the court can determine Quisano's Petition without oral argument. For the following reasons, the court DENIES Quisano's Petition.

II. BACKGROUND

On December 1, 2005, Quisano and his co-defendant, Dustin Ige, were charged in a 10-count Indictment with conspiracy to distribute methamphetamine, its salts, isomers, and salts of its isomers ("methamphetamine"), and distribution of methamphetamine, in violation of 21

U.S.C. § 841.[1] Gov. Ex. A.

On April 12, 2005, Quisano and the government entered into a plea agreement in which Quisano agreed to plead guilty to Count 1, conspiracy to distribute 50 or more grams of methamphetamine, and Count 10, distribution of 50 or more grams of methamphetamine. Gov. Ex. B, ¶ 4. In exchange for his guilty plea, the government agreed to dismiss the remaining counts of the Indictment as to Quisano. *Id.* In the agreement, Quisano expressly waived his right to appeal his sentence except under limited circumstances:

> The Defendant is aware that he has the right to appeal the sentence imposed under Title 18, United States Code, Section 3742(a). Defendant knowingly waives the right to appeal, except as indicated in subparagraph "b" below, any sentence within the maximum provided in the statute(s) of conviction or the manner in which that sentence was determined on any of the grounds set forth in [18 U.S.C. § 3742], or on any ground whatever, in exchange for the concessions made by the prosecution in this plea agreement.
>
> a. The Defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under [28 U.S.C. § 2255], except that defendant may make such challenge (1) as indicated in subparagraph "b" below, or (2) based on a claim of ineffective assistance of counsel.
>
> b. If the Court imposes a sentence greater than specified in the guideline range determined by the Court to be applicable to the Defendant, the Defendant retains

[1] Counts 1 and 3-10 of the Indictment involved charges against Quisano.

> the right to appeal the portion of his sentence greater than specified in that guideline range and the manner in which that portion was determined under Section 3742 and to challenge that portion of his sentence in a collateral attack.
> c. The prosecution retains its right to appeal the sentence and the manner in which it was determined on any of the grounds stated in Title 18, United States Code, Section 3742(b).

Id. ¶ 13.

On April 12, 2005, Quisano entered his guilty plea before the court. During the plea colloquy, Quisano acknowledged that he understood and had spoken with his attorney about the plea agreement. Gov. Ex. D, 5. Quisano also acknowledged that he understood that the plea agreement limited his right to challenge a sentence in a collateral attack except under two circumstances -- if the court imposed a sentence greater than the sentencing guidelines, or if his attorney provided ineffective assistance of counsel. *Id.* at 13-14. After determining that Quisano's plea was knowing and voluntary, the court accepted Quisano's plea. *Id.* at 22.

On June 27, 2005, the Probation Office prepared a Presentence Investigation Report ("PSR"), which included a section titled "Financial Condition: Ability to Pay." The PSR determined Quisano's ability to pay a fine "based on documentation submitted by the defendant and a review of computer

credit bureau records." PSR ¶ 72. The PSR listed the following assets: (1) $2,100 from checking and savings accounts; (2) $86,000 in unsecured assets including $35,000 from motor vehicles, $50,000 from his business, and $1,000 from jewelry; and (3) $32,000 in secured assets from another motor vehicle. *Id.* The PSR did not explain how Quisano's business worth was determined, but did state that the value of the vehicles was based on their fair market value. The PSR determined that Quisano's net worth was $92,100 by subtracting $28,000 for a car loan from the total assets of $120,100. The PSR concluded that "[b]ased on the defendant's financial profile and earning capability, it appears that he is able to pay a fine." *Id.*

The PSR was provided to Quisano, who did not object to the net worth calculation. Indeed, each of his three sentencing statements was silent regarding Quisano's ability to pay a fine. *See* Doc. Nos. 34, 41, 43.

On March 14, 2006, the court entered a judgment. Considering the § 3553(a) factors and the government's motion for a downward departure, Quisano was sentenced to 54 months of imprisonment, four years of supervised release, a fine of $15,000, and a special assessment of $200.00. Gov. Ex. C. The imposed prison sentence was below the sentencing guideline range, and the fine was within the advisory guideline range of $15,000 to $4,000,000. *Id.*

On December 7, 2007, Quisano filed his Petition for Writ of Error

Coram Nobis, attacking the $15,000 fine. On January 22, 2008, the government filed a Memorandum in Opposition.

III. DISCUSSION

Quisano argues that he is entitled to a writ of error coram nobis because the PSR improperly calculated his ability to pay a fine, which resulted in a fine in violation of the Excessive Fines Clause of the Eighth Amendment. Pet. 5. Specifically, Quisano argues that the PSR's calculation of his net worth did not take into account the accumulated depreciation of his vehicles, or that his business inventory was held as consignment. When his correct net worth of $23,300 is taken into consideration, Quisano contends that his fine should be $3,796. The government argues that the court should deny Quisano's Petition because Quisano (1) waived his right to collaterally attack his sentence, and (2) failed to establish two elements necessary for a writ of error coram nobis. As explained below, the court agrees with each of the government's reasons, and finds that Quisano is not entitled to the relief he seeks.

A. Quisano's Waiver of Right to Appeal

Petitioner's waiver of his right to collaterally attack his sentence is enforceable if (1) the language of the waiver encompasses his right to attack his sentence on the grounds raised, and (2) the waiver was knowingly and voluntarily

made. *See United States v. Joyce*, 357 F.3d 921, 922-23 (9th Cir. 2004); *United States v. Rodriguez*, 360 F.3d 949, 959 (9th Cir. 2004); *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993).

In the plea agreement, Quisano expressly waived:

> his right to challenge his sentence or the manner in which it was determined *in any collateral attack*, including, but not limited to, a motion brought under [28 U.S.C. § 2255], except that defendant may make such challenge (1) [on the portions of his sentence greater than that specified in the guideline range, if the court imposes such a sentence], or (2) based on a claim of ineffective assistance of counsel.

Gov. Ex. B, ¶ 13 (emphasis added). Because "a petition for writ of error coram nobis is a collateral attack on a criminal conviction," *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994), and Quisano does not base his Petition on either of the exceptions listed in the plea agreement, the court finds that the plea agreement's waiver language encompasses his right to collaterally attack through a petition for writ of error coram nobis. *See United States v. Chavez-Salais*, 337 F.3d 1170, 1172 (10th Cir. 2003) (stating that the "conventional understanding of "collateral attack" comprises challenges brought under . . . writs of coram nobis").

The court further finds that Quisano waived his rights knowingly and voluntarily. The plea agreement clearly recites the waiver. Gov. Ex. B, ¶ 13.

Further, during the April 12, 2005 plea colloquy, Quisano acknowledged that he understood and had spoken with his attorney about the plea agreement, and that the plea agreement limited his right to challenge his sentence in any collateral attack with the inapplicable exceptions. Gov. Ex. D, 5, 13-14. After determining that Quisano's plea was knowing and voluntary, the court accepted Quisano's plea. *Id.* at 22. Based on the above, the court DENIES Quisano's Petition because he waived his right to collaterally attack his sentence, including the $15,000 fine.

B. Writ of Error Coram Nobis

Even if Quisano had not expressly waived his right to collaterally attack his sentence, Quisano's Petition still fails.

"Coram nobis is an extraordinary writ, used only to review errors of the most fundamental character." *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002); *see also United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007) ("Both the Supreme Court and we have long made clear that the writ of error coram nobis is a highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is applicable.").

To qualify for the extraordinary remedy of a writ of error coram nobis, a petitioner must show that:

> (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character.

Riedl, 496 F.3d at 1006 (*quoting Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987). "Because these requirements are conjunctive, failure to meet any one of them is fatal." *Matus-Leva*, 287 F.3d at 760 (*citing United States v. McClelland*, 941 F.2d 999, 1002 (9th Cir. 1991)).

Quisano fails to establish at least two of these four elements. First, Quisano fails to provide any valid reason for not challenging his fine earlier. "[C]ourts have denied relief on this ground where the petitioner has delayed for no reason whatsoever, where the respondent demonstrates prejudice, or where the petitioner appears to be abusing the writ" by attempting to "re-litigate claims or circumvent procedural bars." *United States v. Kwan*, 407 F.3d 1005, 1013 (9th Cir. 2005); *see also Riedl*, 496 F.3d at 1006 (finding writ of error coram nobis could not be issued where claims could have been raised earlier and no sound reasons for delay exist).

The PSR, completed on June 27, 2005, was provided to Quisano. Quisano did not object to the net worth calculation in any of his three sentencing statements. *See* Doc. Nos. 34, 41, 43. Quisano's Petition provides absolutely no

reason why he delayed raising these alleged errors for over two and a half years after receiving the PSR, and one and a half years after being sentenced. With no proffered reason whatsoever for the delay, Quisano has failed to carry his burden of proof to offer valid reasons for the delay.[2]

Second, Quisano fails to establish that the PSR's calculation of his net worth "is of the most fundamental character." The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (emphasis deleted). "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (citations omitted) (applying the Excessive Fines Clause to a criminal forfeiture). In determining the constitutionality of a fine, the court "must compare the amount of the [fine] to the gravity of the defendant's offense. If the amount of the forfeiture

[2] The government also argues that laches applies to bar Quisano's Petition. Because Petitioner has failed to prove *any* reason for his delay, the court need not address whether laches applies here.

is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id.* at 336-37.

Quisano argues that the $15,000 fine was excessive, and exceeds the applicable fine by $11,204. Quisano rationalizes that $15,000 is 16.29% of his net worth as calculated by the PSR; applying this percentage to his correct net worth of $23,300 results in a fine of $3,796. Pet. 5. Quisano's argument does not persuade the court.

Fines are not determined based on a percentage of net worth; they are determined based on various factors, including the offense conduct and the defendant's ability to pay. *See, e.g.*, United States Sentencing Guideline § 5E1.2. Quisano's fine was not disproportional to the gravity of his offense; indeed, the fine imposed was the minimum suggested by the sentencing guidelines. *See* PSR ¶ 87 (describing that pursuant to U.S.S.G. §§ 5E1.2(c)(1) & 5E1.2(c)(4), the fine range is from $15,000 to $4,000,000). Even accepting Quisano's claim that his net worth was in fact $23,300, a fine of $15,000 was reasonable and appropriate. Accordingly, Quisano has failed to establish any violation of the Excessive Fines Clause.

Further, Quisano has provided no evidence that supports his contention that the PSR used an incorrect valuation of his business or vehicles.

Regarding his business, Quisano argues that the PSR erroneously considered consignment inventory that he did not own as business assets. Pet. 9. Quisano does not, however, provide any evidence that establishes that he held his inventory as consignment. Rather, the only evidence he presents is a note indicating that he recently sold his business for $4,200. Pet. Ex. 2. While this amount is substantially less than the $50,000 valuation, this exhibit does not establish that, as of the date of the PSR, Quisano's business was worth less than $50,000, or that the $50,000 calculation was based on consignment inventory.

Quisano also argues that the PSR failed to include accumulated depreciation on his vehicles, which lowers their worth to $12,000. Pet. 8. The term "accumulated depreciation" refers to the reduction of the carrying amount of an asset on a balance sheet to reflect loss of value over time. An asset's fair market value reflects this depreciation -- it is axiomatic that an individual cannot sell a used vehicle for the same price that he purchased it. The PSR, by determining the fair market value of each of these vehicles, therefore included depreciation in its calculation. Accordingly, it is unclear whether Quisano is arguing that the PSR (1) incorrectly used the fair market value of the vehicles at the time they were purchased, (2) improperly determined the vehicles' fair market value based on name, brand, model and year of each vehicle without taking into

account their actual value, Pet. 9, or (3) should have determined the value of the vehicles at the time Defendant is scheduled to be released from prison. Pet. 5. Regardless of which theory Quisano proceeds under, however, he has provided no evidence to support any theory of "accumulated depreciation." The court therefore finds that Quisano has failed to establish that the PSR's calculation of his net worth "is of the most fundamental character."

IV. CONCLUSION

For the reasons discussed above, the court DENIES Quisano's Petition for Writ of Error Coram Nobis.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 7, 2008.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge